

DECISION

26405
THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D.C. 20548

FILE: B-210831

DATE: August 2, 1983

MATTER OF: Dr. Martin Blinder, et al.

DIGEST:

There is no authority to allow payment of claims for services as expert witnesses at Army court-martial proceeding where claimants' services were not authorized in advance by the convening authority as required by paragraph 116 of the Manual for Courts-Martial. Also, the claims do not contain such elements of unusual legal liability or equity to warrant their submission to the Congress under the Meritorious Claims Act, 31 U.S.C. § 3702(d).

This action is in response to a submission by Ms. Alice McCarty, Chief, Field Services Division, of the U.S. Army Finance and Accounting Center, Indianapolis, Indiana, of the claims of four individuals for fees as expert witnesses in connection with their consultation services and testimony incident to a court-martial proceeding. The Army advises that the claims have not been allowed since the expert witnesses were not employed in accordance with the required procedure set forth at paragraph 116, of the Manual for Courts-Martial, 1969 (Revised) and section 13-38 of Army Regulation 37-106. The Army has requested that the Comptroller General of the United States submit these claims for expert witness fees to the Congress for relief under the Meritorious Claims Act of 1928, now codified at 31 U.S.C. § 3702(d) (formerly 31 U.S.C. § 236). For the reasons stated below, the claims do not present such elements of legal liability so as to warrant submission to Congress under the Meritorious Claims Act.

In October and November of 1981, the services of Drs. Martin Blinder, Roy R. Auerbach, Julian Silverman and Mr. Terrence Hickey were obtained as expert psychiatric witnesses in the court-martial proceedings in United States v. King. Drs. Blinder, Auerbach and Silverman have submitted claims in the respective amounts of \$1,000, \$360, and \$750 for the total hours they spent on psychiatric

026315

consultation, actual testimony and related traveltime. In addition, Dr. Silverman has claimed reimbursement for travel by privately owned vehicle. Mr. Hickey has submitted a claim in the amount of \$850 which represents \$300 for consultation and actual testimony and \$550 for reimbursement for days he was absent from his regular employment as a result of his activities associated with the court-martial proceeding.

The claimants were called as expert witnesses at the direction of the military trial judge upon the application of the defense counsel. However, their services were obtained without the prior approval of the convening authority as required by paragraph 116, of the Manual for Courts-Martial, 1969 (Revised) which provides:

"116. EMPLOYMENT OF EXPERTS. The provisions of this paragraph are applicable unless otherwise prescribed by regulations of the Secretary of a Department. When the employment of an expert is necessary during a trial by court-martial, the trial counsel, in advance of the employment, will, on the order or permission of the military judge or the president of a special court-martial without a military judge, request the convening authority to authorize the employment and to fix the limit of compensation to be paid the expert. The request should, if practicable, state the compensation that is recommended by the prosecution and the defense. When, in advance of trial, the prosecution or the defense knows that the employment of an expert will be necessary, application should be made to the convening authority for permission to employ the expert, stating the necessity therefor and the probable cost. In the absence of a previous authorization, only ordinary witness fees may be paid for the employment of a person as an expert witness."

The applicable agency regulation which is set forth at section 13-38 of Army Regulation 37-106, affirms the advance authorization requirement of paragraph 116, cited above, and provides as follows:

***13-38. Expert Witnesses (Persons not in Government Employ and not Members of the Uniformed Services)**

"a. General. When the employment of an expert witness is necessary during a trial by a military court, the trial counsel will request the convening authority to authorize an expert in advance of such employment (para 116, MCM, 1969). The invitational travel orders should state the compensation recommended by the prosecution and defense. In addition, travel allowances authorized in paragraph 13-35 may be authorized for travel to and from the place of trial. The terms of the invitational travel order should be specific if the compensation includes travel allowances to and from place of trial or specify the travel allowances authorized in addition to the compensation. In the absence of the authorization and the prescribed procedures, only the ordinary witness fees and travel allowances may be paid for the employment of the witness."

In view of the above regulations, the Army has determined that it does not have the authority to allow the claims for services as expert witnesses.

This Office has held that there is no authority to pay the fees of an expert witness in the absence of prior authorization of such employment as is required by the applicable provision of the Manual for Courts-Martial. See B-49109, June 25, 1945, and B-168623, February 17, 1970, and June 19, 1970. Compare B-57527, June 3, 1946.

In view of the above, the Army properly denied the payment of fees as expert witnesses in this case. In accordance with paragraph 116 of the Manual for Courts-Martial and section 13-38 of Army Regulation 37-106 the claimants are only entitled to receive payment of ordinary witness fees. As ordinary witnesses the claimants are entitled to payment of witness fees in the same amount as is paid under 28 U.S.C. § 1821(b) (Supp. IV, 1980) to witnesses appearing before the courts of the United States. Cf. 36 Comp. Gen. 777 (1957).

As an ordinary witness, Dr. Silverman is entitled to the payment of mileage for travel by privately owned conveyance in the same manner as provided under 28 U.S.C. § 1821(c)(2) (Supp. IV, 1980) for witnesses appearing before the courts of the United States. See 36 Comp. Gen. 777, cited above. Under 28 U.S.C. § 1821(c)(2) witnesses are entitled to a mileage allowance at the same rate as that prescribed by the Administrator of General Services pursuant to 5 U.S.C. § 5704. The mileage rate applicable to Dr. Silverman's travel, set forth at paragraph 1-4.2 of the Federal Travel Regulations (FPMR 101-7), is 22.5 cents per mile.

The Army has requested that we refer to the Congress as meritorious claims the above claims for fees for services as expert witnesses.

The Meritorious Claims Act, now 31 U.S.C. § 3702(d), provides as follows:

"(d) The Comptroller General shall report to Congress on a claim against the Government that is timely presented under this section that may not be adjusted by using an existing appropriation, and that the Comptroller General believes Congress should consider for legal or equitable reasons. The report shall include recommendations of the Comptroller General."

The remedy afforded under the Meritorious Claims Act is an extraordinary remedy whose use is limited to extraordinary circumstances. B-171176, December 3, 1970, and B-191696, June 22, 1981. The cases we have reported for the consideration of the Congress have involved equitable circumstances of an unusual nature and which were unlikely to constitute a recurring problem, since to report to the Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances. See 53 Comp. Gen. 157 (1973), and B-191696, cited above.

Since there have been other cases where individuals have been denied fees for services as expert witnesses where there was a lack of prior authorization by the proper authority, these claims are neither unusual nor do they

B-210831

represent a nonrecurring situation. Therefore, we find no element of unusual legal liability or equity which would justify our reporting these claims to the Congress for its consideration under the Meritorious Claims Act.

for *Milton J. Aroslaw*
Comptroller General
of the United States